IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.174 OF 2005

Smt.Anusaya A. Sabale & Ors. ...Appellants

vs.

Smt.Suvarna Balu Sabale & Ors. ...Respondents

Mr.R.V.Govilkar for the Appellants

CORAM: A.S.OKA,J.
DATE : MARCH 10,2005.

P.C.:

1. The Second Appeal is by unsuccessful Defendants. There is a decree for partition and separate possession in favour of the original Plaintiff Nos.2 to 4 which is confirmed by the Appellate Court.

2. Shri Govilkar, learned Counsel for the Appellants submitted that in the plaint the original Plaintiffs had admitted that the Will was executed by deceased Nathu on 8th November 1974 and in fact in the plaint there is a challenge to the legality and validity of the said Will. He therefore submitted that there was no burden on the Appellants to establish the execution of the Will.

3. He submitted that the Appellate Court has disbelieved the case of the Appellants as regards the execution of the Will only on the ground that the testimony of original Defendant No.2 was of interested person who was the beneficiary under

the Will. He submitted that in compliance with Section 69 of Indian Evidence Act, 1872 the execution of the Will was established. He pointed out that the beneficiary under the Will is not disqualified from establishing the execution of the Will.

4. I have considered the submissions. Both the Courts below have come to the concurrent finding that the execution of the Will by deceased Nathu is not duly established. The Trial Court has noted that the Appellant No.2-Defendant No.2 who was relying upon the Will is the beneficiary has not made any attempt to give names of any of the relatives of attesting witnesses. The Appellate Court has considered the oral evidence of all the witnesses including the evidence of son of scribe who allegedly drafted the Will. The Appellant No.2 was the beneficiary under the Will is not the only reason given by the Appellate Court for discarding his evidence. The Appellate Court has noted that in the examination-in-chief the Appellant No.2 could not state the name of one of the attesting witnesses and he could state only the name of one attesting witness Shri Shankar Maruti Patil. Only after he was recalled on the basis of application at Exh.69., he disclosed the name of the other attesting witness. Considering these factual aspects and after appreciation of the oral evidence on record, the Courts below have held that the execution of the Will by deceased Nathu is not established.

5. The suit filed by the Plaintiffs is for partition. In the averments made in the plaint they have contended that deceased Nathu was not in a position to execute any testamentary disposition and taking undue advantage of physical and mental condition of deceased Nathu the document of Will has been procured by the Appellant No.2, with a view to defeat the claim for partition by original Plaintiff No.2. It was for the Appellants to prove the Will in accordance with law.

6. The findings recorded by the Courts below on the question of proof of Will are the findings of fact based on consideration of oral and documentary evidence. Even if another conclusion is possible to be drawn on the basis of the said evidence, it is not permissible to do so in the Second Appeal under Section 100 of Code of Civil Procedure, 1908. No substantial question of law arises. Second Appeal is dismissed with no order as to costs.

JUDGE.